No. 83-218

In The
Supreme Court of the United States
October Term 1983

AMOS REED, etc., and the
ATTORNEY GENERAL OF THE
STATE OF NORTH CAROLINA,

Petitioner,

vs.

DANIEL ROSS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 29, 1983.
CERTIORARI GRANTED DECEMBER 5, 1983.

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RELEVANT DOCKET ENTRIES

2/03/78 1. ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—(Dupree, J).

2. PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY and AFFIDAVIT IN SUPPORT OF

REQUEST TO PROCEED IN FORMA PAUPERIS.

3/13/78 3. ANSWER TO PETITION AND MOTION TO DISMISS w/ cs.

3/14/78 4. COPY OF TRANSCRIPT—No. 18 Supreme Court of N.C., Fall Term 1969, from Wake—to be attachmen to Answer filed 3/13/78.

3/21/78 6. SUPPLEMENTARY TRAVERSE TO THE RETURN MOTION TO DISMISS AND PETITION FOR HABEAS CORPUS.

• • •

10/22/80 17. ORDER . . .

10-23-80 18. JUDGMENT ON DECISION BY THE COURT—plaintiff's motion to file Exhibits is granted, defendant's motion to dismiss is granted, and this action is hereby dismissed.

11-03-80 19. NOTICE OF APPEAL—1c League, 1c 4th Circuit, 1c Judge Dupree. (ent. 12-2-80).

EXCERPTS FROM PETITION

DANIEL ROSS
Name

20747-92-09
Prison Number

CALEDONIA PRISON FARM

BOX 137, TILLERY, NC. 27887
Place of Confinement

United States District Court EASTERN
District of NORTH CAROLINA

CASE No. #78-62-HC

DANIEL ROSS, PETITIONER

v.

AMOS REED, etc., et al., RESPONDENT

and

THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, ADDITIONAL RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

• • •

1. Name and location of court which entered the judgment of conviction under attack WAKE COUNTY SUPERIOR COURT, WAKE COUNTY, N. C.
2. Date of Judgment of conviction MARCH 16, 1969.
3. Length of sentence LIFE Sentencing Judge LEO CARR.
4. Nature of offense or offenses for which you were convicted: 1st Degree Murder.
5. What was your plea? (Check one)
   (a) Not guilty (×)
6. Kind of trial:
   (a) Jury(×)
7. Did you testify at the trial? Yes (×)
8. Did you appeal from the judgment of conviction? Yes (×)
9. If you did appeal, answer the following:
   (a) Name of court NORTH CAROLINA SUPREME COURT.
   (b) Result NO ERROR.
   (c) Date of result OCTOBER 15, 1969.

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: U.S. SUPREME COURT, No review.

• • •

(12) B. Ground two: DENIAL OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

Supporting FACTS (tell your story *briefly* without citing cases or law): THE COURT CHARGED THE JURY, "THERE ARE TWO PRESUMPTIONS THAT ARISE IN FAVOR OF THE STATE: ONE, THAT THE KILLING WAS UNLAWFUL; TWO, THAT IT WAS DONE WITH MALICE; AND THE BURDEN THEN SHIFTS TO THE DEFENDANT, ETC. (Rp 42). HENCE PLACED UPON THE PETITIONER BURDENS OF PROOF LATER HELD BY THE U.S. SUPREME COURT TO BE VIOLATIVE OF DUE PROCESS, MULLANEY V. N. C., 421 US 684 (1966) WHICH RULING WAS GIVEN RETROACTIVE EFFECT IN HANKERSON V. N.C., 421 US 684 (1977) AND APPEARS AT (Rp 42).

C. Ground three: DUE PROCESS REQUIRES NORTH CAROLINA TO PROVE DELIBERATE RATE BY-PASS OR KNOWING AND INTELLIGENT WAIVER STANDARD.

Supporting FACTS (tell your story *briefly* without citing cases or law): THE ISSUES AROSE AS A MATTER OF LAW AND AFTER HIS APPEAL, MULLANEY V. N.C., 421 US 684 (1966) WHICH RULING WAS GIVEN RETROACTIVE EFFECT IN HANKERSON V. N. C., — US —, (1977). THE N.C. COURTS HAVE NOT ATTEMPTED TO PROVE DELIBERATE BY-PASSED THE ISSUES ASSERTED BY PETITIONER OR HIS FAILURE TO RAISE THE ISSUES IN OTHER PETITIONS FILED IN THIS MATTER OR ASSERT THEM AT THE TIME OF HIS TRIAL OR ON DIRECT APPEAL NOR HAS THE STATE AFTER AN AR-

GUMENT THEREON, BY A FULL AND FAIR EVIDENTIARY HEARING, TOWNSEND V. SAIN, 372 US 293 (1963) PROVEN "KNOWING AND INTELLIGENT WAIVER" STANDARD OF JOHNSON V. ZERBST, 304 US 458 (1938); FAY V. NOIA, 372 US 391 (1963).

• • •

Executed on 1-17-78, 1978.
(Date)

/s/ Daniel Koss
(Signature)

Filed February 3, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

78-62-HC

DANIEL ROSS,

Petitioner,

v.

AMOS REED, etc., et al.,

Respondents.

ANSWER TO PETITION AND MOTION TO DISMISS

(Filed March 15, 1978)

TO: THE HONORABLE PRESIDING JUDGE OF SAID COURT:

The respondents, answering and moving to dismiss the petition for writ of habeas corpus filed herein, say:

1. Petitioner is a prisoner of the State of North Carolina who, at the March 17, 1969, Session of Wake

County Superior Court, Honorable Leo Carr, Judge Presiding, entered a plea of not guilty in case number 68 CR 4266, in which he was charged with murder in the first degree. Upon this plea, he was tried by jury, before whom he testified, was convicted of murder in the first degree with a recommendation that the sentence be life imprisonment and was sentenced by Judge Carr to life imprisonment. Petitioner appealed his conviction to the North Carolina Supreme Court, which court, in an opinion filed 15 October 1969 and reported at 275 NC 550, found no error. Petitioner was represented at trial and on appeal by William Merriman, Esquire. Since that time, this Honorable Court has had occasion to become familiar with petitioner through several applications for writ of habeas corpus with this Court challenging either his conviction or matters relating to his imprisonment, *Ross v. Blackledge,* Civil 2186, application denied March 9, 1972, affirmed on appeal No. 72-1949, August 8, 1972; *Ross v. Blackledge,* Civil 4030, application denied September 1, 1972, affirmed on appeal 73-1378, April 16, 1973; *Ross v. Lewis,* Civil 4454, application denied January 2, 1974, affirmed on appeal 74-1194, May 26, 1976; *Ross v. Baker,* Civil 74-129-HC, application denied July 1, 1975, affirmed on appeal 75-8243, filed August 4, 1976. Additionally, petitioner received certain pre-trial credits against his sentence in an application entitled *Ross v. Blackledge,* Civil 3038, relief allowed June 2, 1972, and presently has one additional writ pending before this Honorable Court, *Ross v. Reed,* 77-329-HC.

2. Petitioner contends his constitutional rights were violated because the state was allowed to use presumptions of malice and unlawfulness against him by proving

that his victim was murdered with a deadly weapon. Petitioner has exhausted his state remedies with regard to this contention and it entitles him to no relief.

3. Petitioner's claim is unmeritorious for a number of procedural and substantive reasons. First, this matter was not raised on appeal and under state procedural law, *eg. State v. Brower and Johnson,* 293 NC 259 (1977), review of it is forfeited. The basis of the North Carolina Supreme Court's decision in the above case is that footnote 8 of *North Carolina v. Hankerson,* — US — (1977) insulates this type of claim from review under the circumstances presented in petitioner's case. That footnote reads in part as follows:

> ". . . It is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions . . . . Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instruction anyhow. The states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any error. See *eg.* FRCP 30."

North Carolina does not have this rule except for errors in recapitulating the evidence and errors in the statement of the contentions of the parties or failures to charge on the "subordinate features" of the case, *4 Strong's North Carolina Index 2d,* Criminal Law, § 113.9, 163. However, it has a comparable one to that referenced in footnote 8— that failure to raise an issue of record on appeal bars its subsequent review by collateral means, N.C. G.S. § 15-217; *State v. White,* 274 NC 220 (1968). This is also comparable to existing federal decisional law that a writ of habeas

corpus cannot be used as a substitute for appeal, see 28 USCA § 2255, note 12 and annotations contained therein; and the necessary corollary of this rule that failure to raise such an issue on appeal forfeits review of it. Therefore, respondents believe that the above dictate dismissal of petitioner's application on both of the procedural grounds above.

4. Additionally, petitioner's assertion is without any substantive merit. The presumptions about which petitioner complains deal with the crime of second degree murder. Petitioner was convicted of first degree murder and accordingly the presumptions were not used to his detriment. This being so, any error would be harmless beyond a reasonable doubt and therefore not a basis for relief to petitioner, *Chapman v. California,* 386 US 18 (1967); *Harrington v. California,* 395 US 250 (1969). Further, in *Mullaney v. Wilbur,* 421 US 634 (1975), the case on which petitioner apparently relies, the Supreme Court commented on the use of presumptions such as the one involved in petitioner's case. The comment appeared in footnote 31 at which place the Supreme Court did not condemn such presumptions but instead stated only that they must "satisfy certain due process requirements". The Court then cited *Barnes v. United States,* 412 US 837 (1973) which case holds that ". . . if a statutory inference submitted to the jury as sufficient to support conviction . . . is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt . . . then it clearly accords with due process". This fits in with the *Mullaney* decision because the vice condemned by that case is the possibility of conviction of one offense where it is as likely as not that an accused deserves conviction for a signifi-

cantly lesser offense. However, the ideas expressed by *Mullaney* and by *Barnes* are not denigrated by the use of the presumptions of malice and unlawfulness involved in this case. This is because the killing of another with a deadly weapon is not normally a lawful act or one done without the quality of malice accompanying it. Instead, in the overwhelming number of cases, the opposite is true. Accordingly, the presumption petitioner attacks does not run afoul of either of the above judicial precedents and, in fact, enhances the reliability of the fact-finding process by precluding a "doubting Thomas" approach to the evidence. In addition, with regard to the presumption relating to unlawfulness, the determination of this fact is largely a determination of the matter of privilege or excuse. Therefore, the use of this presumption presents a situation somewhat akin to the one presented in *Leland v. Oregon*, 343 US 790 (1952), where the Supreme Court upheld the burden of proof of insanity being placed on an accused. Accordingly, for the additional reasons above, petitioner is not entitled to any relief.

5. Although petitioner does not allege it, it appears that the burden of proof to satisfy the jury with regard to self-defense was also placed on petitioner. Should this Honorable Court desire to take judicial notice of that fact and adjudicate this claim, respondents contend that the same procedural bars previously set out apply to this contention. Additionally, respondents contend that *Mullaney v. Wilbur, supra,* does not preclude the placing of the burden of proof on self-defense on an accused in a murder case. *Mullaney* involved an attempt by a state to shift part of the burden of proof with regard to an ele-

ment of the crime to an accused. Shifting the burden on self-defense, however, does not involve this because self-defense does not negative any of the elements of the crime but instead goes to show some matter of justification or excuse which is a bar to the imposition of criminal liability, see *LaFave and Scott,* Criminal Law, p. 146. In accordance with this approach is *Patterson v. New York,* — US — (1977). In light of the foregoing then, a writ of habeas corpus should not issue on account of this factor in petitioner's case.

WHEREFORE, respondents, pray that Your Honor will deny the said petitioner's application and that a writ of habeas corpus will not be issued in his behalf.

Respectfully submitted,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

/s/ Richard N. League (PBH)
Assistant Attorney General

(Verification and Service Omitted.)

EXCERPT OF SUPPLEMENTARY TRAVERSE
(Filed March 21, 1978)

2. . . . . Under the rule of law set forth in *Mullaney v. Wilbur* and *Hankerson v. North Carolina,* North Carolina's jury instruction requiring the defendant to prove self-defense violates the Due Process Clause of the Fourteenth Amendment in a First Degree Murder prosecution.

No. 105 PC TWENTY-SECOND DISTRICT
DAVIDSON COUNTY

SUPREME COURT OF NORTH CAROLINA

Fall Term 1978

STATE OF NORTH CAROLINA

v.

BILLY LEE HANCOCK

ORDER AWARDING NEW TRIAL UPON DEFENDANT'S PETITION FOR FURTHER REVIEW

Defendant petitioned Davidson Superior Court for post-conviction relief on the ground that at his trial for second degree murder at the 17 March 1975 session of that court the trial court unconstitutionally placed the burden of proving the absence of malice in order to reduce his crime to manslaughter, and self-defense in order to excuse it altogether upon the defendant. From a denial of this petition defendant applied for a writ of certiorari to the Court of Appeals which was likewise denied on 9 October 1978. He petitions us for further review of that denial.

The issue of self-defense was properly presented at defendant's trial. The trial judge in his jury instructions placed the burden of proving this defense upon the defendant. Although defendant did not assign this as error in his appeal to the Court of Appeals, which found no error in his trial, State v. Hancock, 28 N. C. App. 149, 220 S. E. 2d 167 (17 December 1975), defendant did seek to appeal to this Court on the ground, among others, that the jury instructions in his trial violated Mullaney

v. Wilbur, 421 U. S. 684 (9 June 1975) as interpreted in State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (17 December 1975). Having determined in Hankerson that the Mullaney rule was not retroactive, we allowed the state's motion to dismiss defendant's appeal. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the United States Supreme Court determined that we had erred in declining to hold the *Mullaney* rule fully retroactive.

Inasmuch, therefore, as defendant did seek to raise on direct appeal to this Court, and before the judgment against him was final, the question of the constitutionality of the trial judge's instruction placing the burden on defendant to prove self-defense and the Court being of the opinion that in light of Mullaney v. Wilbur, *supra,* and Hankerson v. North Carolina, *supra,* his appeal on that ground should have been allowed and defendant awarded a new trial, the Court having permitted the defendant Hankerson to raise the same question for the first time in this Court, State v. Hankerson, *supra,* now, therefore, it is

ORDERED by the Court in conference that defendant's petition for further review be allowed for the sole purpose of further ordering that defendant be and he is hereby awarded a new trial. *See* orders earlier entered in various cases at 293 N.C. 259-263 (1977).

This the 29th day of November, 1978.

/s/ _____
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 30th day of November, 1978.

/s/ John R. Morgan
Clerk of the Supreme Court
of North Carolina

BILL OF INDICTMENT File #68-CR-4266

In the General Court of Justice, Superior Court Division
STATE OF NORTH CAROLINA
COUNTY OF WAKE

1st February "R" Session, 1969

The State of North Carolina

v

Daniel Ross, Defendant

INDICTMENT—MURDER

THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, that Daniel Ross late of the County of Wake on the 2nd day of November 1968, with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder Mary Elizabeth Young Ross contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

W. G. RANSDELL, JR.
Solicitor

WITNESSES:

X D. W. Martin (RPD)
X J. L. Barbour (RPD)
Leon Gerell Young
Charles McAllister

Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found A True Bill.

TED L. DANIEL
Foreman Grand Jury

(Returned 10 February 1969)

• • •

ORDER OF APPOINTMENT OF LEGAL COUNSEL FOR INDIGENT DEFENDANT (14 FEBRUARY 1969)

• • •

CLERK'S MINUTES

3/17/69—The defendant having been arraigned as appears of record, the selection of the jury began.

3/18/69—After the selection of the jury was completed and the 12 jurors were empaneled the court ordered that a 13th or alternate juror be chosen.

Leon Gerald Young, Charles McCallister, J. L. Barbour, Dr. Dewey Pate and E. B. Pearce were sworn and examined in behalf of the State.

At the close of the State's evidence the defendant's motion for judgment as of nonsuit denied. Defendant excepts.

Bernice Ross and Daniel Ross were sworn and examined in behalf of the defendant.

Leon Gerald Young, Charles McCallister and J. L. Barbour were recalled by the State in rebuttal.

Bernice Ross recalled by the defendant in rebuttal.

D. W. Martin was sworn and examined in behalf of the State.

At the close of all the evidence the defendant's motion for judgment as of nonsuit denied. Defendant excepts.

Pending further action in this case the court recessed until 9:30 a.m. Friday, March 19, 1969.

3/19/69—After argument of counsel for the defendant, argument of the solicitor for the State the court finds that juror #7, Charles B. Cooke has a death in his immediate family and that it is brother-in-law and the fu-

neral is this afternoon; the court in its discretion excuses juror Charles B. Cooke to the end that he may be with his family and attend the funeral of his brother-in-law this afternoon and directs that the 13th juror Calvin R. Boseman, Jr. now take seat #7 in the jury box and that he become one of the regular jurors.

Jury empaneled.

After the charge of the court and jury deliberation, the jury returned a verdict of guilty of murder in the 1st degree with the recommendation that punishment be life imprisonment in the State Prison.

Upon motion of the defendant through his attorney the jury was duly polled.

The defendant through his attorney moved that the verdict be set aside and moved for a new trial. Denied. Defendant excepts.

See signed Judgment.

Defendant in open court gives notice of appeal to the North Carolina Supreme Court. (See Appeal Entries).

JANE L. CARUTHERS
Ass't Clerk Superior Court

PLEA, VERDICT, JUDGMENT AND COMMITMENT

In open court, the defendant appeared for trial upon the charge of Murder, and thereupon entered a plea of not guilty. Evidence was heard for the State and for the defendant including testimony of the defendant in his own behalf. The jury, after deliberation, returned a verdict of guilty of murder in the 1st degree with the

recommendation that punishment be life imprisonment in the State Prison.

Having been found guilty of the offense of murder in the 1st degree with the recommendation that the punishment be life imprisonment in the State Prison which is a violation of the law and of the grade of felony.

It is ADJUDGED that the defendant be imprisoned for the term of the remainder of his natural life in the State Prison to be assigned to work under the supervision of the North Carolina Department of Correction.

• • •

EXCERPTS FROM
DEFENDANT'S EVIDENCE

DANIEL ROSS Testified:

My name is Daniel Ross. I am twenty-one years old. On November 2, 1968, I was living in Jamica, New York. At that time I was married to Mary Elizabeth Ross and we had two children. Mary and I were not separated; however, I had been living in New York for about two months.

On November 2, 1968, I rode a bus to Raleigh to see my wife and children. When I arrived in Raleigh, I went to my mother's home and met my sister, Bernice Ross. At about 2:30 or 3:30, my sister and I drove to my mother-in-law's house. My wife's brother, Leon Young, my wife, my sister-in-law, my two children, and Charles McAllister were there.

Bernice Ross, Mary Ross, and my two children and I left to go to North Hills Shopping Center. After buy-

ing some clothes for my children, we left North Hills Shopping Center and went back to my mother-in-law's house. My sister, my wife, and I went into the house. Charles McAllister was in the bathroom and my sister asked him to let her use the bathroom. When Bernice came out of the bathroom, my wife asked her to leave the room so that we could talk in private. My wife and I had a conversation about a girl that I used to mess around with. At that time, Leon Young came inside the room and went into the kitchen. Mary walked to the kitchen and whispered something in his ear.

My wife and Leon were in the kitchen talking and Leon picked up a knife, fork, or something. When I got up and started back in the room, my wife, all of a sudden, stabbed me in the back of the neck. It felt something like a sting. I had the baby in my arms and I don't know whether I dropped the baby or whether someone took the baby or what. When I turned around, I turned around shooting. My wife had one arm up with a knife in her hand. I shot twice.

Charles McAllister came out of the bathroom and Leon approached me with some object in his hand as I was standing on the steps. I unloaded the gun, put another bullet in the gun, and fired a shot toward Leon. I ran to the car. Blood was coming out of my neck real fast, and the side of my sleeve was bloody, and all down my front was bloody. I ran out to the car, put my three year old child in the car and my sister drove away out 64 East. She started to make a turn at Wake Memorial Hospital, and I told her not to go there. We drove to Southampton Memorial Hospital in Franklin, Virginia,

where I received treatment for a stab wound. At the hospital I gave them my name as Coldon Ross.

(A medical report from Southampton Hospital was introduced into evidence upon agreement from the solicitor, allowing introduction of the same.)

After I left the hospital, I went to Richmond, Virginia, and spent the night in a hotel. I found out that my life was dead about 10:00 or 10:30 when I called Wake Memorial Hospital. The next day I went to New York City and stayed there until I was picked up by the police, on November 29, 1968. I fired the first two shots because I had been stabbed in the neck, and I was defending myself. I fired the third shot because I was afraid Charles McAllister was going to try to do something to me, and her brother having this object in his hand.

• • •

JUDGE'S CHARGE

(ROA 34) Members of the jury, the defendant in this action, Daniel Ross, is charged with murder. The State alleges in the bill of indictment that he is guilty of murder in the first degree. To the charge in the indictment the defendant came into open court and entered a plea of not guilty to the charge and that—. Upon his entering such a plea the law raised a presumption in his favor that he is innocent of the charge, and that presumption of innocence goes with him and surrounds him throughout every stage of his trial until the jury finds beyond a reasonable doubt that he is guilty. The burden is on the State to satisfy the jury beyond a reasonable doubt of his guilt.

• • •

(ROA 35) The court instructs you that murder in the first degree is the unlawful and wilful killing of a human being with malice and with premeditation and deliberation.

• • •

(ROA 36) There are three other verdicts that you may render in addition to guilty of murder in the first degree or guilty of murder in the first degree with the recommendation that the punishment be life imprisonment instead of death or murder in the second degree, guilty of murder in the second degree, guilty of voluntary manslaughter or not guilty.

EXCEPTION NO. 14

The court instructs you that murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Malice is not only hatred, ill-will, or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to intentionally take the life of another without just cause, excuse, or justification. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the intentional killing with a deadly weapon; and a pistol or a gun is a deadly weapon.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation, and in this case the court will instruct you with respect to voluntary manslaughter. There being two kinds of manslaughter, voluntary manslaughter and involuntary manslaughter; involuntary manslaughter being a grade of manslaughter that arises when there is an unintentional killing

of a person by the culpably negligent use of a deadly weapon with no intention to assault with and cause injury but by reason of the culpably negligent use of the weapon, but that does not arise in this case and you are concerned with whether or not on the charge of manslaughter the defendant is guilty of voluntary manslaughter; and in that respect the court instructs you that voluntary manslaughter is said to be the unlawful killing of another without malice and an instance of that being where one unlawfully kills another by reason of anger aroused by provocation which the law deems adequate. In such case the anger so aroused is held to displace malice and will reduce the unlawful homicide to the grade of manslaughter. Reason should at the time of the act be disturbed or obscured by passion to the extent which might render an ordinary man of fair, average disposition liable to act rashly or without due deliberation or reflection and from passion rather than judgment.

EXCEPTION NO. 15

The defendant in this action relies upon the doctrine of self-defense and contends that any shooting that he did he was acting in his own proper self-defense. The court instructs you that when one is without fault and an assault is made upon him with a deadly weapon with such intensity as to cause him to believe that he is about to suffer death or great bodily harm at the hands of his adversary and he has a reasonable ground for such belief he does not have to retreat, but may stand his ground and defend himself and protect himself from death or great bodily harm; and in doing so he may use such force as is reasonably necessary or he believes is necessary, and he has a reasonable ground for such belief to protect himself from death

or great bodily harm, and if he kills his assailant and it is necessary, or he believes it to be necessary to protect himself from death or great bodily harm and he has a reasonable ground for such belief it is an excusable homicide.

The court instructs you in connection with the doctrine of self-defense that a person is not, even though permitted to use a deadly weapon in his own defense, to use any more force than is reasonably necessary to accomplish the purpose in mind, that is to protect his self from death or great bodily harm; and as the court has instructed you he can use such force as is necessary or he believes is necessary and has reasonable ground for that belief to protect himself from death or great bodily harm. It is for the jury and not the defendant to say whether or not he had reasonable ground to believe that he was about to suffer death or great bodily harm at the hands of his assailant, and it is for the jury and not the defendant to say whether or not he used more force than was reasonably necessary under the circumstances to accomplish the purpose he had in mind. In determining those two facts, however, it is the duty of the jury to put, that is jurors to put themselves in the position of the defendant at the time of the killing and to determine those facts in the light of how the circumstances appeared to him at that time and not in the light of how they now appear to the jury; and in doing that it is the duty of the jury not to weigh the conduct of the defendant in golden scales.

EXCEPTION NO. 16

• • •

(ROA 39) The State contends that you should return a verdict of guilty of murder in the first degree.

• • •

(ROA 41) If you are not satisfied beyond a reasonable doubt that he did kill her with malice and deliberation and premeditation then you will—you do not find the evidence sufficient to render a verdict of guilty of murder in the first degree then the State contends that you should consider whether or not he is guilty of murder in the second degree or manslaughter.

Now, in respect to that the court instructs you that in a case where a person is killed as a result of a gun shot wound fired intentionally that where the State has satisfied you beyond a reasonable doubt that the defendant intentionally assaulted the deceased with a deadly weapon and that such assault caused her death there are two presumptions that arise in favor of the State: One, that the killing was unlawful; two, that it was done with malice; and the burden then shifts to the defendant under those circumstances to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but to satisfy the jury that the killing was not done with malice if he would acquit himself of a charge of murder in the second degree, that is if he would expect and ask at your hands a verdict of less than guilty of murder in the second degree the burden would be upon him under the circumstances to satisfy the jury that the killing was not done with malice and if he would exonerate himself and show that the killing was not unlawful then the burden is upon him to satisfy the jury, as the court has indicated not beyond a reasonable doubt nor by the greater weight of the evidence but to satisfy the jury that the killing was done

under some, for some reason recognized by the law as justifiable; and he relies here on self-defense; contends that you should find that he did not kill her except in his own proper self-defense within the meaning of that term as it has been defined to you by the court. (Italics supplied.)

The State contends, however, that you should not find, if you come to consider the question of whether or not he is guilty of murder in the second degree; that you should find from the evidence he intentionally assaulted his wife with a deadly weapon and that that assault resulted in her death and that there is nothing in the evidence, so the State contends, that should lead you to believe that he has satisfied you from the evidence that the killing was done without malice; and that in that event you should return a verdict of guilty of murder in the second degree.

• • •

(ROA 44) He contends that you should find that there was some argument over a woman and one word brought on another and the first thing he knew she went into the kitchen and with the aid of her brother, I believe, who handed her some kind of a weapon, she came back where he was and stabbed him in the back of the neck with a knife or some weapon that caused a considerable gash in his neck and caused him to fear that she was going to assault him again;

• • •

(ROA 45) Now, he makes this contention, that he did shoot another time. I believe an officer went on the stand and testified that he did see two empty cartridges at the side door and one that was loaded. He contends that he reloaded his pistol which didn't have—wouldn't

hold but two cartridges he contends; and that his shooting after the shooting that occurred in the room when he shot the first two shots that that was not at his wife, but that he was in fear of his wife because he testified, as the court recalls, that McAllister had a weapon of some kind.

• • •

(ROA 46) If you find that he did not shoot at his wife and shot at McAllister, then the court instructs you that the burden would be upon the State to satisfy you under those circumstances beyond a reasonable doubt that he intentionally assaulted McAllister if he shot at McAllister with a deadly weapon, to wit: a pistol, and he had no lawful right to do so, and in doing so he, the bullet hit his wife then he would be guilty if the State has satisfied you beyond a reasonable doubt that he shot at McAllister trying to hit him and did it with malice and did not under circumstances showing that he did not have the right to do it under the doctrine of self-defense as that term has been defined and explained by the court, then in that event he would be guilty of murder in the second degree.

• • •

(ROA 49) And in respect to the assault made upon his wife . . . he has not satisfied you that such killing was done without malice, it would be your duty to return a verdict of guilty of murder in the second degree. If under those circumstances he has satisfied you that the killing was done without malice, you would then proceed to the consideration of whether or not he is guilty of voluntary manslaughter.

• • •

(ROA 51) If the State has satisfied you beyond a reasonable doubt that he shot at McAllister but did not have any right to do so under the doctrine of self-defense, as that term has been defined and explained to you by the court, then in that connection it would be your duty to return a verdict of guilty of voluntary manslaughter.

• • •

However, if under those circumstances in connection with his contention, if you accept his contention to be correct, that in the hall he did not shoot at his wife but was shooting at McAllister and the State has failed to satisfy you beyond a reasonable doubt in shooting at McAllister that he did not have the right to shoot at McAllister under the doctrine of self-defense, as that term has been defined and explained to you by the court, and that under those circumstances in shooting at McAllister he hit his wife it would be your duty to return a verdict of not guilty.

EXCERPT FROM NORTH CAROLINA SUPREME COURT DECISION ON ROSS' APPEAL

[4] In addition to the objection to the cross examination of the defendant and the introduction of the bullets in evidence, the defendant contends the court committed error in failing to charge the jury that it might render a verdict of involuntary manslaughter. The court charged the jury that under the evidence it might render one of these verdicts: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree with recommen-

dation that the punishment be imprisonment for life in the State's prison; (3) guilty of murder in the second degree; (4) guilty of manslaughter; (5) not guilty. The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the State to carry the burden required a verdict of not guilty. The court charged fully and correctly on the defendant's right to defend himself and to repel felonious assault.

275 NC at 554

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

No. 78-62-HC

DANIEL ROSS,

Petitioner,

vs.

AMOS REED, etc., et al.,

Respondents.

ORDER

(Filed October 22, 1980)

This petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254 is before the court for a ruling after having been stayed pending the Fourth Circuit's decision in *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980). After *Cole* the parties were ordered to file written arguments applying the *Cole* opinion to this case. The parties have so responded and the case is now ripe for decision.

Petitioner Ross was convicted of first-degree murder in 1968. On direct appeal he excepted to certain aspects of the trial judge's charge to the jury. In his Assignment No. 9, he contended that the trial court should have charged the jury as to the law of involuntary manslaughter. In his Assignment No. 10, he contended that the court did not properly define self-defense. (Record on Appeal to N. C. Supreme Court, p. 57.) He did not except to that portion of the charge where the judge placed upon the defendant the burden to rebut a presumption that an intentional killing is done unlawfully and with malice. (Record on Appeal, p. 42.) Furthermore, the trial judge departed from the then customary charge and instructed the jury that the state had the burden to satisfy the jury beyond a reasonable doubt that the killing had not been in self-defense. (Record on Appeal, p. 51.) In considering petitioner Ross' appeal of jury instruction errors, the North Carolina Supreme Court stated: "The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the state to carry the burden required a verdict of not guilty." *State v. Ross*, 275 N.C. 550, 554, 169 S.E.2d 875 (1969).

Ross contends that these assignments of error adequately raised the *Mullaney* issues on his direct appeal to permit him to avoid the procedural default bar announced in *Cole*. It is clear from the record, however, that he did not clearly present the *Mullaney* issues as required by the North Carolina Supreme Court Rule 19 (3). *See, e.g., State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596 (1973), *motion for reconsideration denied*, 293 N.C. 260, 247 S.E. 2d 234 (1977). The issue presented is whether the North

Carolina Supreme Court, by addressing Ross' contentions in such a broad fashion, waived its own rule and considered the *Mullaney* issue sua sponte.

The North Carolina Supreme Court has at times waived its rule that asserted errors be clearly presented and has proceeded to the merits of asserted errors in jury instruction where those errors had not been clearly presented. *E.g., State v. Freeman,* 295 N.C. 210, 244 S.E.2d 680 (1978); *State v. Rigsbee,* 285 N.C. 708, 208 S.E.2d 670 (1974). In such cases the Supreme Court's waiver is explicitly acknowledged. In the present case the Supreme Court did not explicitly waive its rule and cannot reasonably be said to have actually considered the *Mullaney* issue despite he broad language of the holding.

Accordingly, plaintiff's motion to file exhibits is granted, defendant's motion to dismiss is granted, and this action is hereby dismissed.

SO ORDERED.

/s/ F. T. Dupree, Jr.
United States District Judge

October 21, 1980.

Filed October 22, 1980.